7. "Thus the court of appeal authorized itself to engage in a broad discussion of Louisiana Civil Code principles and dismiss or ignore on-point case law." Pet. at 11.

8. "In effect, the court authorized itself to interpret Louisiana legislation *de novo*, without following the interpretation deemed appropriate by Louisiana courts in a long line of cases." Pet. at 11.

9. "The Louisiana state courts have held, without discord, that lien waivers are enforceable, and a Louisiana appellate court rejected the theory that contract 'dissolution' may abrogate a limitation-of-remedies clause." Pet. at 14.

10. "Louisiana courts may look to legislative principles rather than analogous case law *when there is no case law on a point*, but they do not look to legislative principles in lieu of applicable precedents." Pet. at 15.

11. "Moreover, the statutory 'dissolution' theory adopted by the Court of Appeals was rejected by a state intermediate court and review was denied by the Louisiana Supreme Court only two years ago." Pet. at 16.

12. "Additionally, the court of appeals' approach is out of step with the approaches used by other circuits in interpreting Civil Codes." Pet. at 16.

13. "The court of appeals adopted an interpretation of civil law principles that flatly conflicts with Louisiana case law." Pet. at 17.

14. "The theory that a material breach of contract permits dissolution under La. C.C. art. 2016 and obviates a promise to limit remedies conflicts with recent Louisiana jurisprudence that was not even addressed by the court of appeals." Pet. at 21.

REASONS FOR DENYING THE PETITION

The Fifth Circuit's ruling applied Louisiana Civil Code articles 2013-2018 (regarding dissolution of contracts) *as written* and is in accord with the Louisiana Supreme Court's decisions in *Sliman v. McBee*, 311 So.2d 248 (La. 1975) and *Robertson v. Buoni*, 504 So.2d 860 (La. 1987), as well as an intermediate state court's decision in *North Development Co., Inc. v. McClure*, 276 So.2d 395 (La. App. 2d Cir. 1973). The decision below does not violate *Erie*, does not conflict with any other decision of this Court, and properly interprets and applies the substantive law of Louisiana.

PCS charges the Fifth Circuit with violating *Erie* by utilizing a "different methodology" for determining state law in Louisiana. PCS argues that the Fifth Circuit ignored a "long line of on-point state court decisions" and adopted a "special civil law metho[d]" which conflicts with this Court's prescribed approach for ascertaining state law. Specifically, PCS asserts that the Fifth Circuit failed to enforce an "unequivocal lien waiver" in a manner consistent with state court rulings.

Contrary to PCS's argument, however, there is no "long line of on-point case law" supporting PCS's position. In fact, PCS has not cited a single case where a Louisiana court enforced a lien waiver clause in a dissolved contract. Further, the authorities cited by PCS do not support the enforcement of a lien waiver where there has been a failure of cause or consideration, or a material breach of a commutative contract which had the effect of voiding the contract *ab initio*.

A. The Fifth Circuit Did Not Depart From the *Erie* Protocol

The *Rules of Decision Act*, 28 U.S.C. § 1652, states:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in Civil actions in the courts of the United States, in cases where they apply.

In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), this Court held that in cases not governed by the Federal Constitution or by acts of Congress, the law of the state is to be applied, "[a]nd whether the law of the state shall be declared by its *Legislature in a statute* ***or*** by its *highest court in a decision* is *not a matter of federal concern* (emphasis added)." *Id.* at 78. The *Erie* Court held that the term "laws" included *both* state statutes and the so-called "common law" declared by the state's courts.

Subsequent to the *Erie* decision, the U.S. Supreme Court ruled that where a state's highest court had not declared the substantive law on a particular issue, a lower state court's decision on the issue could be considered by a federal court sitting in diversity as "datum" for the purpose of ascertaining the state law "unless it is convinced by other persuasive data that the highest court of the state would decide otherwise". *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237-38 61 S. Ct. 179, 183-84, 85 L. Ed. 139, 144-45 (1940).

In *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 61 S. Ct. 176, 85 L. Ed 109 (1940), this Court reversed a decision of a Circuit Court of Appeals which, although recognizing

its duty to follow (New Jersey) state law, applied a state statute in a manner contrary to decisions by intermediate state courts which stood "as the *only exposition of the laws of the State* with respect to the construction and effect of the [subject] statutes . . ." (emphasis added) *Id.* at 179. This Court noted that it is "inadmissible that there should be one rule of state law for litigants in state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship." *Id.* at 180.

The Fifth Circuit's decision in the instant matter does not run afoul of the *Rules of Decision Act*, *Erie*, *West* or *Fidelity Union Trust*. Both the *Act* and *Erie* require federal courts to apply "the law of the state" but do not distinguish the state's *judicial decisions* from its *legislation* as sources of state law, nor do they favor intermediate state court case law over legislation. By expressly following a decision by Louisiana's highest court (*Sliman v. McBee*, supra.) and applying legislation *as written*, the Fifth Circuit did not transgress the rule established in *West*.

In an effort to conjure a conflict with *Fidelity Union Trust*, PCS asserts that the Fifth Circuit disregarded decisions by intermediate Louisiana (appellate) courts in reaching its decision. In reality, however, the Fifth Circuit was *not* confronted with a *Fidelity Union Trust* dilemma because it was able to find a basis for its ruling in unambiguous legislation (La. C.C. arts. 2013 *et seq.*) and a decision of the state's highest court. (*Sliman*, supra).[2] Therefore, it was not compelled to look to "other persuasive data" (e.g. the inapposite court cases cited by PCS).

---

[2] Moreover, the dilemma confronted in *Fidelity Union Trust* (i.e. "conflict" between the literal interpretation of a state statute and a contrary interpretation by an intermediate state court) would never exist in Louisiana, because both its Legislature and Supreme Court have declared that *legislation* is the superior source of law and statutory enactments must be applied *as written*. *See* Section B.1., below.

It is manifestly evident, from even a cursory review of the Fifth Circuit's opinion, that it did not "create a different *Erie* methodology for interpreting Louisiana law." The Fifth Circuit's opinion accurately recites the principle that in Louisiana the primary source of law is legislation "and not (as in the common law) a great body of tradition in the form of prior decisions of the courts. . . ." Albert Tate, Jr., *Techniques of Judicial Interpretation in Louisiana*, 22 La. L.Rev. 727-728 (1962).

The Fifth Circuit's adoption of a civil law method for deciding the case is not "out of step" with other circuits which have interpreted civilian codes.[3] The legitimacy of "civil law methods" has been universally recognized. *See* Stephen G. Breyer, *The Relationship Between the Federal Courts and the Puerto Rico Legal System*, 53 Rev. Jur. U.P.R. 307, 310 (1984). Civilian jurisdictions look to legislation as the basis of private law. This is to be contrasted with common law states, such as California, which views its civil code as a mere supplement to a much more expansive body of law articulated in judicial decisions. *See* Alvin B. Rubin, *Hazards of a Civilian Venturer in Federal Court: Travel and Traveler on the Erie Railroad*, 148 La. L. Rev. 1369 (1988).

The Fifth Circuit's ruling does *not* "*create a different rule of law in federal diversity cases than exists in state courts*" Pet. at 23. The Fifth Circuit's approach is entirely consistent with the civilian methodology and interpretive principles laid down by the Louisiana Supreme Court in *Willis-Knighton Medical Center v. Caddo Shreveport Sales and Use Tax*, 903 So. 2d 1071, 2005 WL 737481 (La.), 2004-0473 (La. 4/1/05),

[3] Louisiana's civilian methodology of looking to *legislation* as the primary source of law does not require a federal court, sitting in diversity and applying the law of Louisiana, to totally disregard state court rulings — and the Fifth Circuit did not do so in this case.

discussed infra, which held that state courts are bound to recognize the superiority of legislation over jurisprudence and apply unambiguous statutes *as written*. Clearly, however, adoption of the unorthodox approach advocated by PCS could bring about the "inadmissible" result proscribed by *Fidelity Union Trust*, supra, in that a federal court would be bound to decide a case under a methodology inconsistent with Louisiana Supreme Court standards.

B. The Fifth Circuit Did Not Disregard Louisiana Law

PCS's petition sharply criticizes the Fifth Circuit's "*adopt[ion] of the so-called 'civil law metho[d] for resolving cases*" and denigrates the civilian methodology *in general* and *as applied* by the Fifth Circuit. Pet. at 3, 8, 11, 14. As noted above, the legitimacy of "civil law methods" has been universally recognized. PCS further argues that the Louisiana Supreme Court might apply some *different* method of analysis, and suggests that the state's high court would favor intermediate court decisions over a literal application of Louisiana Civil Code articles (particularly Articles 2013-2018 regarding the dissolution of contracts). On this issue, PCS is dead wrong.

As noted throughout this *Opposition*, the Fifth Circuit did in fact follow the controlling precedent of Louisiana's highest court with respect to the applicable substantive law, and therefore its consideration of lower court opinions (particularly those cited by PCS) was unnecessary. Further, and to the extent that the case required an "*Erie* guess" as to substantive law, the Fifth Circuit properly employed the civilian methodology as it has done over the course of many years in prior diversity cases. See for example, *American International Specialty Lines Insurance Company v. Canal Indemnity Company*, 352 F.3d 254, 260-261, C.A. 5 (La.) 2003, citing *Lake Charles Diesel, Inc. v. General Motors Corp.*, 328 F.3d 192, 197 C.A. 5 (La.) 2003.

1. *The Fifth Circuit Properly Applied Louisiana's "Civilian Methodology"*

In April of 2005, the Louisiana Supreme Court published its opinion in *Willis-Knighton Medical Center v. Caddo Shreveport Sales and Use Tax*, 903 So. 2d 1071, 2005 WL 737481 (La.), 2004-0473 (La. 4/1/05). The high court's central focus was the proper interpretation of a Louisiana Civil Code Article (Art. 466), particularly in the context of the diametrically opposed federal court decisions of *Equibank v. United States Internal Revenue Service*, 749 F.2d 1176 (5th Cir. 1985) and *Prytania Park Hotel, Ltd. v. General Star Indemnity Co.*, 179 F.3d 169 (5th Cir. 1999) which, the court noted, had "spawned a civilian cause-celebre". At the heart of the controversy was the extent to which certain jurisprudence which pre-dated the 1978 revision of the Civil Code's property law articles was relevant to the interpretation of Article 466 under the "civilian methodology."

In its analysis, the Louisiana Supreme Court referred to *Prytania Park* as a "landmark decision" and praised the U.S. Fifth Circuit for its repudiation of prior case law in favor of a literal interpretation of Civil Code Article 466 (consistent with proper civilian methodology). In an instructive discourse on the superiority of legislation over jurisprudence in Louisiana, and the requirement that Civil Code articles must be applied *as written*, the Louisiana Supreme Court stated:

> "First, civilian methodology and the civil code instruct that the sources of law are legislation and custom, and that legislation is the superior source of law. *LSA-C.C. arts. 1, 3.* Legislation, which is defined as the solemn expression of legislative will, *LSA-C.C. art. 2*, is to be interpreted according to the rules set forth

> in the Civil Code. Chief among those rules is the admonition in *LSA-C.C. art. 9* that "[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." Additionally, LSA-C.C. art. 11 instructs that "[t]he words of a law must be given their generally prevailing meaning." Thus, we begin, as we must, with the words of the law. *Dumas v. State, Department of Culture, Recreation & Tourism*, 2002-0563, p. 11 (La.10/15/02), 828 So.2d 530, 536." *Willis-Knighton, supra*, 903 So. 2d at 1085.

In *Willis-Knighton*, the Louisiana Supreme Court noted that the chief impediment to adopting an interpretation of Article 466 consistent with *Prytania Park* was "the body of *intermediate state court jurisprudence* that had developed in the wake of *Equibank*." The court overcame that obstacle by confirming that such jurisprudence is inferior to legislation, which must be applied as written:

> 'Reliance on *jurisprudence constante*, however, is misplaced as will be noted *infra*. Furthermore, we are a civilian jurisdiction in which legislation, the solemn expression of the legislative will, is the superior source of law. LSA-C.C. art. 2. *Jurisprudence constante* carries "considerable persuasive authority," *Doerr v. Mobil Oil Corp.*, 00-0947, p. 14 (La.12/19/00), 774 So.2d 119, 128, but is not the law." *Id* at 1087, 1088.

* * *

> "In Louisiana, legislation is superior to any other source of law. LSA-C.C. art. 2. We apply legislative provisions as written because this court cannot and should not ignore the plain expression of legislative will evidenced in the clear and unambiguous words of LSA-C.C. art. 466." *Willis-Knighton, supra*, at 1092.

Many of PCS's representations of "Louisiana law" stand in diametric opposition to the principles clearly set forth in *Willis-Knighton*. For example, PCS's Petition states (Pet. at 15) that: "Louisiana courts may look to legislative principles rather than analogous case law *when there is no case law on a point, but they do not look to legislative principles in lieu of applicable precedents*" (*emphasis* added). On that point, PCS could not be more wrong. It is impossible to square PCS's arguments with *Willis-Knighton*.

Shaw submits that the Fifth Circuit properly applied Louisiana's civil law methodology. The Fifth Circuit properly applied Civil Code articles *as written*, properly distinguished and dismissed intermediate state court decisions, and respected the decisions of the Louisiana Supreme Court, notably *Sliman v. McBee*, 311 So.2d 248 (La. 1975), discussed infra.

2. *The Fifth Circuit Followed State Law Governing Dissolution of Contracts*

The Fifth Circuit enforced the "strong right to dissolution" which is a well-established civilian remedy, deeply rooted in the Louisiana Civil Code (particularly Articles 2013-2018 and their source articles), Pet. App. at 20-22. Louisiana Civil Code Article 2013 provides that "*[w]hen the obligor fails to perform, the obligee has a right to the judicial* ***dissolution*** *of the contract*

or, according to the circumstances, to regard the contract as ***dissolved.***" Pet. App. 20, fn 41. Similarly, Article 2016 provides, in pertinent part, that "*when it is evident that the obligor will not perform, the obligee may regard the contract as* ***dissolved*** *without any notice to the obligor.*" Pet. App. 69. The right of contract dissolution, as established by Louisiana's legislature, is routinely enforced by Louisiana's Supreme Court and appellate courts.

In the leading case of *Sliman v. McBee*, 311 So.2d 248 (La. 1975) – cited in the Fifth Circuit's opinion Pet. App. at 18-20 – the plaintiff had executed an act of sale in which she agreed that "no lien shall exist on the lots here sold" to secure payment of notes given by the defendants as part of the purchase price. When the defendant defaulted in payment, the plaintiff brought suit for dissolution of the sale. The Louisiana Supreme Court held that a "dissolving, or resolutory, condition is implied in all commutative contracts and takes effect upon the failure of either party to comply with his engagement and the demand for dissolution by the aggrieved party."

Applying *Sliman*, the Fifth Circuit determined that the subcontract provision by which Shaw "agrees to and does waive its right to file any mechanics' lien or claims" against PCS's property did not constitute a waiver of Shaw's right to dissolve the contract. That holding is fully consistent with *Sliman*, in which the Louisiana Supreme Court held that the plaintiff's waiver of lien rights (vendor's lien) did not effect a waiver of her right to dissolve the contract of sale.[4]

---

[4] Although the Fifth Circuit did not cite the more recent decision of the Louisiana Supreme Court in *Robertson v. Buoni*, supra, the high court again expressly followed *Sliman* in dissolving a contract of sale of immovable property, notwithstanding the fact that the seller had waived vendor's lien.

The Fifth Circuit's opinion is also consistent with a Louisiana appellate court's decision in *North Development Co., Inc. v. McClure*, 276 So.2d 395 (La. App. 2d Cir. 1973), wherein the court held that a subcontractor's contractual "waiver of lien rights" under the LPWA did not survive the dissolution of the contract. In *North Development*, a subcontractor (McClure) brought suit against a project owner and the prime contractor seeking sums due under a construction subcontract and recognition of his lien rights under the LPWA. The owner defended on the grounds that the subcontractor had waived his lien rights as one of the terms of the subcontract. However, when the court dissolved the contract (on a finding that there was "no meeting of the minds") the court also refused to enforce the lien waiver. Instead, the court recognized and enforced the subcontractor's lien rights under the LPWA. The court noted that "the invalidation of the written contract because of error renders the provisions thereof relating to waiver of lien rights . . . by [the subcontractor] ineffective." *Id.* at 400.

It is quite revealing that PCS's *Petition* makes no reference to the highly-relevant *Sliman*, *Robertson* or *North Development* cases. These cases stand for the proposition that Louisiana contracts are subject to dissolution, notwithstanding a contractual lien waiver therein, and that the lien waiver will not survive the dissolution of the contract.

C. The Fifth Circuit's Ruling Does Not Conflict With Any Controlling State Court Decisions

1. *PCS Misstates Louisiana Law Regarding Lien Waivers*

PCS inaccurately asserts that the Fifth Circuit adopted an interpretation of civil law principles that "flatly conflicts with Louisiana case law." In support of this contention, PCS cites a number of Louisiana cases which, for the reasons noted in more detail below, are readily distinguishable or otherwise inapplicable.

Shaw does not dispute the premise that Louisiana courts have enforced "lien waivers" that were executed in exchange for contemporaneous payment, alternative security or other consideration. However, that factual scenario does not exist in this case. Shaw disputes PCS's contention that any Louisiana court has ever enforced a lien waiver in a factual circumstance similar to the instant case. PCS has not cited any case in which a court enforced a contractual lien waiver in the context of a failure of consideration or material breach. None of the cases cited by PCS support the contention that a lien waiver, included as a term of a contract, will survive dissolution of the contract.

2. *The Cases Cited By PCS Are Distinguishable*

Toomer v. Price, 122 So. 856 (La. 1929), cited by PCS, is readily distinguishable on its facts and holding, in that it did not involve a dissolution of a contract or material breach of any agreement involving a lien waiver. In *Toomer*, a material supplier (Louisiana Western Lumber Company) and the contractor (Mr. Price) approached a surety for the purpose of obtaining a $10,000 bond for a construction project. As "*an inducement to furnish the bond*" the lumber company agreed that it would

not record a lien for the lumber to be furnished. On the basis of the lumber company's inducement and assurance, the surety issued the bond and the project went forward. When the contractor failed to pay the lumber company, it filed a lien. The court did not permit the material supplier to enforce its lien to the prejudice of the surety, who had fulfilled its promise to furnish the bond.

In *Toomer,* the court found that the lumber company received *consideration* for its agreement not to file a lien, which consideration was expressed in the guaranty letter: "*Trusting that this assurance [not to file a material lien on the job] will enable you to make the bond for [the contractor] Mr. Price . . .*" There was no failure of that consideration, and the surety (with whom the lien claimant had directly contracted for the "waiver") fully performed its obligations and did *not* default on its agreement. Both the facts and holding of *Toomer* are distinguishable and therefore cannot be said to conflict with the Fifth Circuit's ruling in the instant case.[5]

Executive Office Centers, Inc. v. Cournoyer, 433 So.2d 324 (La. App. 4th Cir. 1983), is cited as support for the general proposition that Louisiana law recognizes the validity of lien waivers (a proposition which is not in dispute). The case involved a mortgage foreclosure and an injunction to arrest it. The plaintiff claimed that the defendant had breached a provision in the subject mortgage which prohibited defendant from entering into a contract "*whereby any lien, privilege, mortgage or other encumbrance in favor of anyone furnishing labor or material may be*

[5] Although *Toomer* was decided by the Louisiana Supreme Court, the case is quite old and did not apply the current version of the LPWA. To the extent that *Toomer* might be perceived to be inconsistent with the Supreme Court's more recent holdings in *Sliman* and *Robertson, supra*, Toomer should be deemed overruled.

recorded against the property." The court found that no breach of the mortgage had occurred because the defendant produced evidence of documents "*which expressly waived any right to lien the property*."

Significantly, *Executive Office Centers* did not address the validity or enforceability of a lien waiver in the context of a breached agreement or failed consideration, nor did the court address whether a lien waiver would survive the dissolution of a contract, nor did the case address the right of a third-party beneficiary to enforce a lien waiver. Thus, it cannot be said that *Executive Office Centers* conflicts with the Fifth Circuit's ruling in the instant case.

Neither *Babineaux v. Grisaffi* 180 So.2d 888 (La. App. 3rd Cir. 1965), *reh. den.* nor *Wardlaw Bros. Garage, Inc. v. Thomas* 141 So. 108 (La. App. 2nd Cir. 1932) addressed liens arising under the LPWA. Rather, both cases dealt with repairmen's liens (created by a different statute) arising out of work performed on *automobiles* pursuant to oral agreements. Based upon unique and distinguishable facts, the courts found that the repairmen's liens were lost "by implication." Notably, the holdings of *Babineaux* and *Wardlaw* have been criticized ("*. . . it is somewhat difficult to square these cases with certain other applicable principles of law . . .*") and distinguished by another Louisiana appellate court, which refused to apply them. *Universal Elec. Const. Co. v. Liner*, 281 So.2d 830, 834 (La. App. 1st Cir. 1973). The Fifth Circuit similarly distinguished *Babineaux* and *Wardlaw* and properly refused to apply them (Pet. App. 27-28, fn 57).

Hero & Company v. Farnsworth & Chambers Co., Inc., 107 So.2d 650, (La. 1958), *reh. den.*, cited by PCS, stands for the proposition that a lien cannot be enforced if the underlying

debt has been discharged by performance. The case is readily distinguishable on both its facts and holding.

In *Hero*, the plaintiff ("Valley") was a material supplier to a subcontractor ("Loup & Younger"). Valley made an agreement with the contractor ("Farnsworth") to waive its "material lien privilege" on the condition that Farnsworth issue "joint checks" to Valley and Loup & Younger. Valley later filed a lien, claiming that it did not receive full payment through the joint check arrangement. The trial court held that Farnsworth had breached the subcontract, and therefore Valley was justified in recording its lien, notwithstanding its agreement not to do so. The Louisiana Supreme Court *reversed*, finding that Farnsworth had "*discharged its obligation [to Valley] properly by putting within the control of plaintiff [Valley] sufficient funds out of which it could have been completely paid.*" The court found that Valley's claim for a materialman's lien was defeated *not* by the "waiver" but rather because *the debt to Valley had been discharged by Farnsworth's performance.* As a matter of law and logic, there could be no *lien* if there is no *debt*. The Fifth Circuit properly distinguished *Hero* Pet. App. 27-28, fn 57, which clearly is not in conflict with its ruling in the instant case.

At paragraph 12 of its Petition, PCS argues: "The theory that a material breach of contract permits dissolution under La. C. C. art. 2016 and obviates a promise to limit remedies conflicts with recent Louisiana jurisprudence that was not even addressed by the [Fifth Circuit]" Pet. at 21-22. In support, PCS cites *Mobile Exploration & Producing U.S., Inc. v. Certain Underwriters*, No. 2001-2219; 837 So.2d 11, La. App. 1 Cir. 2002; *writ denied*, 2003-0418, 841 So.2d 805, (La. 2003).[6]

[6] PCS attempts to make much of the fact that the Louisiana Supreme Court denied review of the *Mobil Exploration* decision (Cont'd)

In *Mobil Exploration*, neither the trial court nor the appellate court granted dissolution of the subject contract. Rather, the court found that a valid contract had been entered into and had been breached; the court awarded damages for breach. The appellate court found that the lower court had erred in its application of La. C.C. art. 2016, as the contract had not been dissolved. *Mobile Exploration* does *not* support PCS's arguments that a contract may not be dissolved on account of a material breach, or that a lien waiver clause would survive contract dissolution or that article 2016 is not to be enforced as written. In light of the clear language of Article 2016, and the Louisiana Supreme Court's decisions in *Willis-Knighton*, *supra*, *Sliman*, *supra*, and *Robertson*, *supra*, PCS's reliance upon *Mobil Exploration* is sorely misplaced.

In sum, none of the "conflicting" Louisiana cases cited by PCS address the survival of a lien waiver when the underlying contract has been dissolved. None of the cases address the enforcement of a "lien waiver" by a third-party beneficiary in the context of a defaulted contract or failed consideration. The cited cases do *not* support PCS's contention that the Fifth Circuit's ruling in the instant case is in direct conflict with authoritative on-point Louisiana case law.

(Cont'd)

only two years ago. It is a well-settled proposition of Louisiana law that the Louisiana Supreme Court's denial of a writ has no precedential value. *See St. Tammany Manor, Inc. v. Spartan Bldg. Corp.*, 509 So.2d 424 (La.1987) and *Pitre v. La. Tech Univ.*, 95-1466 (La.5/10/96) 673 So.2d 585. In a recent opinion dated June 29, 2005, the Louisiana repeated the maxim that "*The denial of a writ in this Court has no precedential value and should in no way be construed as an adoption of a court of appeal's ruling or reasoning.*" *Long v. State of Louisiana, Dept. of Transportation*, 2005 WL 1527757 (La.), 2004-0485 (La. 6/29/05) __ So. 2d __.

CONCLUSION

After making a thorough examination of state legislation and judicial decisions, and applying the method of analysis prescribed by the Louisiana Supreme Court, the Fifth Circuit properly interpreted and applied Louisiana law to this case. The Fifth Circuit faithfully discharged its duty under *Erie*.

For all of the foregoing reasons, PCS's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ERIC A. KRACHT
Counsel of Record
SCOTT E. FRAZIER
KRACHT & FRAZIER, L.L.P.
5149 Bluebonnet Boulevard
Baton Rouge, LA 70809
(225) 293-4568

Counsel for Respondent

(2)

No. 04-1542

SEP 2005
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In The

Supreme Court of the United States

PCS NITROGEN FERTILIZER, L.P.,

Petitioner,

versus

SHAW CONSTRUCTORS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

EUGENE R. PREAUS
EDWARD C. GLEASON
PREAUS, RODDY & ASSOCIATES, L.L.P.
650 Poydras Street – Suite 1650
New Orleans, Louisiana 70130
Telephone: (504) 523-2111

MICHAEL R. FONTHAM
Counsel of Record
JASON M. BILBE
SARAH H. BARCELLONA
STONE PIGMAN WALTHER WITTMANN L.L.C.
546 Carondelet Street
New Orleans, Louisiana 70130
Telephone: (504) 581-3200

Attorneys for Petitioner, PCS Nitrogen Fertilizer, L.P.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

1. In opposing the Petition for a Writ of Certiorari of PCS Nitrogen Fertilizer, L.P. ("PCS"), Shaw Constructors, Inc. ("Shaw") offers alternative positions. First, Shaw asserts that a federal court may make its own interpretation of a Louisiana Civil Code provision, even if it conflicts with state court interpretations, without violating the *Erie* doctrine. [Opp. at 10-14]. Second, it asserts that the United States Court of Appeals for the Fifth Circuit ("court of appeals") followed Louisiana case law in holding that Shaw could dissolve its subcontract with ICF Kaiser Engineering, Inc. ("Kaiser") and abrogate the lien waiver Shaw provided in favor of PCS. [*Id.* at 14-21]. But Shaw misrepresents the Louisiana cases; in fact, all the relevant cases conflict with the court of appeals' decision. Shaw's opposition thus must rise or fall on its argument that the court of appeals, employing a "civilian" methodology, could disregard state cases in interpreting state law. Shaw correctly asserts that the Louisiana Supreme Court could take this action, but it provides no support for the proposition that *Erie* permits a federal court to do so.

2. Shaw relies on a recent Louisiana Supreme Court decision, *Willis-Knighton Medical Center v. Caddo Shreveport Sales and Use Tax*, 2004-0473 (La. 4/1/05); 903 So. 2d 1071, 2005 WL 737481, as upholding and providing "an instructive discourse" on the "superiority of legislation over jurisprudence in Louisiana." [Opp. at 12]. But in that case, the Louisiana Supreme Court merely recognized that an *intervening statute* may, when it is unambiguous, overrule prior conflicting case law. The court held that cases interpreting Louisiana Civil Code provisions that had been repealed, and replaced with articles that were intended to change the law, should not be followed if the

case law conflicted with the new provisions. *Id.* at 1086-87. As the court held, "the content of former Articles 467, 468 and 469 is irreconcilable with that of the new articles." *Id.* at 1086. It concluded: "[W]hile former Article 469 and its jurisprudential gloss remain relevant, former Articles 467 and 468 have been repealed by implication and thus, their judicial interpretations are not relevant." *Id.* at 1087. This analytical approach should not be surprising even to a common law jurist, because the result would be the same in the common law. In this case, in contrast to *Willis-Knighton*, the revised Civil Code articles relied on by the court of appeals were not intended to change the law. Revision Comments, La. C.C. arts. 2013-16 (Comments indicate each article "does not change the law. . . .").

3. In any event, this case does not involve the extent to which the Louisiana Supreme Court or another Louisiana court may set aside precedent in favor of its own interpretation of a state Civil Code provision. Instead, the issue is whether a federal court applying *Erie* may adopt its own interpretation of broad Civil Code articles and reject out of hand a line of state cases that conflicts with the federal court's interpretation. This approach permits the federal court to apply what it thinks the state law "should be," rather than what it is, in violation of *Erie*. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 71, 58 S. Ct. 817, 819, 82 L. Ed. 1188, 1190 (1938). When state courts determine the law, they act as organs of the state, and federal courts are supposed to follow their decisions unless "more convincing evidence indicates the state law is different." *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-78, 61 S. Ct. 176, 178, 85 L. Ed. 109, 113 (1941). Here, the court of appeals' different opinion as to what the law should be, based on a theory never raised as a basis for

appeal, does not constitute the "evidence" that federalism requires for rejecting state case law.

4. Shaw contends that the court of appeals "did in fact follow the controlling precedent of Louisiana's highest court with respect to the applicable substantive law," *citing Sliman v. McBee*, 311 So. 2d 248 (La. 1975). [Opp. at 11, 15]. But Sliman actually conflicts with the court of appeals' holding, because it implicitly upheld the validity of a lien waiver. Indeed, the court of appeals did not rely on *Sliman* for the proposition that a party through contract dissolution may negate a lien waiver; instead, the court cited *Sliman* only for its holding that a lien waiver does not also implicitly waive the independent right of dissolution. [App. 18-19]. *Sliman* could not support the decision in this case, because the Louisiana Supreme Court let stand, and discussed with approval, a lower court ruling that prohibited Mrs. Sliman from enforcing the lien she had waived. 311 So. 2d at 250: "[F]inding that she had waived her right to a vendor's lien in the act of sale, the court refused to allow Mrs. Sliman a vendor's lien. . . . [That decision was affirmed and certiorari was denied]." *Id.* The court permitted Mrs. Sliman to exercise a contract remedy, but not to enforce the lien.

5. The *Sliman* decision illustrates the strained logic required to apply a "dissolution" theory to this case. In *Sliman*, the plaintiff *sued* for dissolution, employing one of the two accepted methods in Louisiana for dissolving a contract. La. C.C. arts. 2013-16; comment, La. C.C. art. 2013; *In re: Liljeberg Enterprises, Inc.*, 304 F.2d 410, 437-38 (5th Cir. 2002) (judicial dissolution or notice of dissolution required, except in limited circumstances). Here, Shaw never gave a notice of dissolution. It sued not to dissolve, but *to enforce*, the contract. Shaw never pleaded

dissolution in the district court. Shaw negotiated a compromise agreement with Kaiser *to enforce* the contract. Shaw did not mention dissolution in the appeal until it filed a reply brief, and it *never* claimed that it had dissolved the contract. The court of appeals imported the "dissolution" solution and the accompanying essay on civilian theory on its own, creating a plaintiff's right to dissolve a contract during an appeal of a suit the plaintiff brought to enforce the contract. [App. 14-22]. This unique approach has no grounding in Louisiana law.

6. Shaw has no credible distinction for *Mobil Exploration & Producing U.S. Inc. v. Certain Underwriters*, No. 2001-2219 (La. App. 1 Cir. 11/20/02); 837 So. 2d 11, *writ denied*, 2003-0418 (La. 4/21/03); 841 So. 2d 805, so it misrepresents the decision. Shaw says *Mobil Exploration* held that "the contract had not been dissolved," but that characterization is erroneous. [Opp. at 21]. *Mobil Exploration* upheld the trial court's determination that the contract was breached. 837 So. 2d at 29-30. The trial court also ruled that the breach permitted the non-breaching party to dissolve the contract and abrogate the limitation-of-remedies provision. *Id.* at 31. The state court of appeal reversed this ruling and specifically held that La. C.C. art. 2016, the provision Shaw relies on in this case, did not permit abrogating the provision limiting contract remedies. *Id.* The court said: "The trial court mischaracterizes the purpose of La. C.C. art. 2016, which is to relieve an obligee of any further performance when the obligor has failed to perform." *Id.* It concluded: "The fact that the contract was breached does not render inoperative the contractual provisions governing breach; otherwise that portion of the contract becomes meaningless." *Id.* Thus,

Mobile Exploration directly conflicts with the court of appeals' interpretation of the Civil Code provision.

7. Shaw cites *North Development Co., Inc. v. McClure*, 276 So. 2d 395 (La. App. 2d Cir. 1973), for the proposition that "a subcontractor's contractual 'waiver of lien rights' under the LPWA did not survive the dissolution of the contract." [Opp. at 16]. But that case did not involve "dissolution" at all; instead, the court held that no contact was ever formed because the subcontractor was not provided the correct specifications and there was no meeting of the minds. The court held: "It is thus apparent that there was a mutual error of fact in regard to the extent of the work to be performed and the payment to be received therefor which was the principal cause of the contract." *Id.* at 399. Since the subcontrator never entered a binding contract, its lien waiver contained in the contract could not be enforced. That case does not stand for the proposition that a party may abrogate a lien waiver by dissolving a contract.

8. Shaw's efforts to distinguish the many Louisiana cases that enforce lien waivers ignores a central truth – the only purpose of a lien waiver is to limit the waiving party's remedy for a breach of contract, specifically, the failure to pay the contract price. If the obligor performs, there is no need to enforce a lien, so a lien waiver can have no effect. Thus, contrary to Shaw's contention, *all the cases* cited by PCS involved or contemplated a "failure of consideration or material breach." [Opp. at 17]. *Toomer v. Price*, 122 So. 856 (La. 1929), involved nonpayment by the principal obligor, the same breach as Shaw alleges here. *Babineaux v. Grisaffi*, 180 So. 2d 888 (La. App. 3d Cir. 1965), and *Wardlaw Bros. Garage, Inc. v. Thomas*, 140 So.

108 (La. App. 2d Cir. 1932), also involved non-payment by the principal obligor. *Executive Office Centers, Inc. v. Cournoyer*, 433 So. 2d 324 (La. App. 4th Cir. 1983), held that lien waivers obtained by an owner protected a mortgage holder from the filing of liens against the mortgaged property in the event the owner failed to make payment on renovation contracts. The lien waivers could have an effect only if the owner breached the contracts, so the court's holding establishes that lien waivers are enforceable in the event of a breach. Shaw correctly points out that in *Hero & Co. v. Farnsworth & Chambers Co.*, 107 So. 2d 750 (La. 1958), the court held that sufficient two-party checks were provided the contractor to pay the subcontractor. Nevertheless, the subcontractor did not actually receive full payment, and the court enforced its waiver of a lien. Shaw can point to no Louisiana case that ever invalidated a lien waiver in a contract because the contract was breached or "dissolved" after the fact.

CONCLUSION

Unlike the Louisiana Supreme Court, the court of appeals was not authorized under *Erie* to employ its own view of the wisest interpretation of state law in place of a conflicting rule established in a line of state cases. The Louisiana state courts have determined that lien waivers are binding; the court of appeals disregarded these rulings in adopting its own interpretation of the Civil Code. This Court should grant a writ of certiorari to determine whether a federal court, in interpreting Louisiana law,

may apply the law as the court believes it "should be" rather than as state courts have declared it.

Respectfully submitted,

EUGENE R. PREAUS
EDWARD C. GLEASON
PREAUS, RODDY & ASSOCIATES, L.L.P.
650 Poydras Street – Suite 1650
New Orleans, Louisiana 70130
Telephone: (504) 523-2111

MICHAEL R. FONTHAM
Counsel of Record
JASON M. BILBE
SARAH H. BARCELLONA
STONE PIGMAN WALTHER WITTMANN L.L.C.
546 Carondelet Street
New Orleans, Louisiana 70130
Telephone: (504) 581-3200